



## INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT ANTIDEGRADATION STANDARDS AND IMPLEMENTATION PROCEDURES

LSA Document #08-764

[www.idem.IN.gov](http://www.idem.IN.gov)

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### Description

Adds 327 IAC 2-1.3, amends 327 IAC 2-1.5-6, 327 IAC 2-1.5-18, 327 IAC 5-2-11.2, 327 IAC 5-2-12.1, 327 IAC 5-3-8, and 327 IAC 15-2-6, and repeals 327 IAC 2-1-2; 327 IAC 2-1.5-4, 327 IAC 5-2-11.3, and 327 IAC 5-2-11.7.

### Citations Affected

327 IAC 2-1-2; 327 IAC 2-1.3; 327 IAC 2-1.5-4; 327 IAC 2-1.5-6; 327 IAC 2-1.5-18; 327 IAC 5-2-11.2; 327 IAC 5-2-11.3; 327 IAC 5-2-11.7; 327 IAC 5-2-12.1; 327 IAC 5-3-8; 327 IAC 15-2-6.

### Affected Persons

This rule applies to a proposed new or increased loading of a regulated pollutant to a surface water of the state that results from a deliberate activity subject to the Clean Water Act (CWA) including a change in process or operation that will result in a significant lowering of water quality.

### Reason(s) for the Rule

The purpose of the antidegradation process is to preserve the existing quality of water that is cleaner than minimum standards. It does this by requiring an evaluation of alternatives before permitting new pollutant loadings above a de minimis level. If the new loading will degrade the existing water quality, the state needs to determine if the social and economic benefits of the water degradation are justified.

Without this antidegradation rule, there is not a clear path to satisfy the federal and state statutory antidegradation requirements. This means that U.S. EPA and citizens may legally challenge the permits, and other regulatory determinations made by IDEM, resulting in uncertainty for regulated entities. The draft rule will allow IDEM and the regulated community to clearly demonstrate that proposed loadings of regulated pollutants to surface waters of the state with existing quality cleaner than the minimum standard will either maintain water quality in the current condition or that the social and economic benefit of the loading outweighs the maintenance of current water quality.

Federal rules require states to develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation. While federal rules require states to have a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation, the federal rules do not specify how the states must implement antidegradation rules. Additional directives affecting antidegradation rules come from the Indiana General Assembly's requirements found in IC 13-18-3 enacted in the 2000 legislative session under Public Law 140-2000 (also known as SEA 431). The General Assembly



adopted additional antidegradation requirements, in the 2009 regular session with the passage of Public Law 78-2009, which are made part of the draft rule.

The federal rules require states to have, at a minimum, three tiers of antidegradation. Tier 1 (40 CFR 131.12(a)(1)) protects existing uses by providing the absolute floor of water quality in all waters of the United States. Tier 2 (40 CFR 131.12(a)(2)) applies to waters whose quality exceeds that necessary to protect the Section 101(a)(2) goals of the Clean Water Act (criteria, 33 U.S.C. 1251(a)(2)). In this case, water quality may not be lowered to less than the level necessary to fully protect the “fishable/swimmable” uses and other existing uses. Water quality in Tier 2 waters may only be lowered after a determination is made that allowing lowered water quality is necessary and will accommodate important economic or social development in the area in which the waters are located. Any such lowering must still assure water quality adequate to protect existing uses fully. Tier 3 (40 CFR 131.12(a)(3)) applies to outstanding national resource waters (ONRWs) where the ordinary use classifications and supporting criteria may not be sufficient or appropriate. States may allow some limited activities that result in temporary and short-term changes in water quality in the ONRW, but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW. Currently, Indiana has no ONRWs.

### **Economic Impact of the Rule**

The economic impact of the draft antidegradation rule is considered to be greater than \$500,000 on regulated entities though it is difficult to quantify since the impact is created by future actions that could be minimized or avoided or may fall under the rule’s various exemptions for which an antidegradation demonstration would be limited in scope. Based upon the 80 permit applications received in 2009 that might be required to consider antidegradation, a consulting cost of \$100 per hour, and IDEM’s estimate that a complex antidegradation process would require 160 professional hours, the annual cost to the regulated community to implement the rule would be up to \$1,280,000. If the cost of professional services was \$300 per hour, this estimate would increase to \$3,840,000 per year. The complete fiscal impact analysis submitted to and approved by the Office of Management and Budget/State Budget Agency can be found at: <http://www.in.gov/idem/5387.htm>

### **Benefits of the Rule**

In addition to the benefit of bringing Indiana into compliance with the CWA requirement to have antidegradation standards and implementation procedures, there are three main benefits of the proposed rule: (1) regulatory certainty; (2) preservation of the capacity of waters to accept new loadings of pollutants from future economic development projects or population growth; and (3) the health and environmental benefits of preserving existing water quality, including the protection of human health. Higher quality water provides better conditions for recreation, tourism, and hunting and fishing, all of which bring considerable income into the state. Drinking water treatment plants are benefited when intake waters need less treatment to provide finished water to customers.

### **Description of the Rulemaking Project**

An extensive public participation process was initiated in early 2008 and included representatives of the regulated community (industrial and municipal wastewater dischargers), environmental community, and IDEM. A large workgroup inclusive of all interested parties

convened on April 29, 2008, to discuss the broad issues involved in this rulemaking. A second large workgroup meeting was held on June 25, 2008, and, at that meeting, the workgroup decided to select a smaller subgroup with chosen representatives from each of the interested sectors (environmental, municipal, and industrial communities) who would continue the rule development process with IDEM. The subgroup held meetings on nearly a monthly schedule from July 2008 through January 2009 and concluded with a final meeting on April 22, 2009. After the final subgroup meeting, IDEM took the collected information and finalized the developing draft rule, which was presented to the large workgroup in an open meeting held on August 4, 2009, in Indianapolis. Through the late summer and early fall of 2009, IDEM held four public meetings outside of the Indianapolis area, including in the cities of Portage, Garrett, Seymour, and Vincennes.

The draft rule was posted in the Indiana Register on December 16, 2009. Extensive public comments were received and considered carefully by IDEM. The draft rule was modified based on IDEM's review of the comments, and the modified draft rule was made available to stakeholders on May 9, 2011. IDEM met separately with groups of representatives from interested sectors in June 2011 (environmental – 6/9/2011, industrial – 6/16/2011, municipal – 6/30/2011) to explain the changes made in the modified draft rule.

For complete information on the workgroup and subgroup activities, please go to:

<http://www.in.gov/idem/5387.htm>

### **Public Notices**

First Notice of Comment Period: October 15, 2008, Indiana Register (DIN: 20081015-IR-327080764FNA).

Second Notice of Comment Period: December 16, 2009, Indiana Register (DIN: 20091216-IR-327080764SNA).

Notice of Public Hearing: December 16, 2009, Indiana Register (DIN: 20091216-IR-327080764PHA).

Change in Notice of Public Hearing: May 25, 2011, Indiana Register (DIN: 20110525-IR-327080764CHA).

Change in Notice of Public Hearing: August 24, 2011, Indiana Register (DIN: 20110824-IR-327080764CHA).

Proposed Rule and Third Notice of Comment Period: December 7, 2011, Indiana Register. (DIN: 20111207-IR-327080764PRA)

Fiscal Impact Statement: December 7, 2011, Indiana Register (DIN: 20111207-IR-327080764FIA).

Notice of Public Hearing: December 7, 2011, Indiana Register (DIN: 20111207-IR-327080764PHA)

Change in Notice of Public Hearing: January 18, 2012, Indiana Register (DIN: 20120118-IR-327110320CHA).

### **Scheduled Hearings**

First Public Hearing to consider Preliminary Adoption: July 27, 2011.

Second Public Hearing to consider Preliminary Adoption: September 14, 2011

First Public Hearing to consider Final Adoption: March 14, 2012.

### **Consideration of Factors Outlined in Indiana Code 13-14-8-4**

Indiana Code 13-14-8-4 requires that in adopting rules and establishing standards, the board shall take into account the following:

- 1) All existing physical conditions and the character of the area affected.
- 2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- 3) Zoning classifications.
- 4) The nature of the existing air quality or existing water quality, as appropriate.
- 5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
- 6) Economic reasonableness of measuring or reducing any particular type of pollution.
- 7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to:
  - (A) human, plant animal, or aquatic life; or
  - (B) the reasonable enjoyment of life and property.

### **Consistency with Federal Requirements**

The CWA is the applicable federal law. Adoption of this rule will bring Indiana into compliance with federal requirements to have statewide antidegradation standards and implementation procedures. The water quality program in Indiana, including the NPDES program, is delegated to the state by the federal government; therefore, this antidegradation rule will be required to be reviewed and approved by the U.S. EPA after it is adopted by the board and promulgated at the state level.

### **Rulemaking Process**

The first step in the rulemaking process is a first notice published in the Indiana Register. This includes a discussion of issues and opens a first comment period. The second notice is then published which contains the comments and the department's responses to comments from the first comment period, a notice of first meeting/hearing, and the draft rule. The Water Pollution Control Board holds the first meeting/hearing and public comments are heard. The first public hearing to consider preliminary adoption of these antidegradation standards and implementation procedures ended with the Water Pollution Control Board (WPCB) deciding not to vote on adoption but instead asking IDEM to review some areas of the rule and make some minor modifications to the rule language. A second public hearing to consider preliminary adoption was held and the WPCB preliminarily adopted the rules.

The proposed rule, also known as the draft rule as preliminarily adopted, is published in the Indiana Register after preliminary adoption along with a notice of second meeting/hearing (to consider final adoption). If the proposed rule is substantively different from the draft rule, a third written comment period is required. The second public meeting/hearing is held and public comments are heard. Once final adoption occurs, the rule is reviewed for form and legality by the Attorney General, signed by the Governor, and becomes effective 30 days after filing with the Legislative Services Agency.

### **Additional Information**

Additional information regarding this rulemaking action can be obtained from MaryAnn Stevens, Rules Development Branch, Office of Legal Counsel, (317) 232-8635 or technical information about the rule can be obtained from Martha Clark Mettler, Deputy Assistant Commissioner, Office of Water Quality (317) 232-8402 or (800) 451-6027 (in Indiana).